**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED APRIL 4, 2003**

**UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

No. 01-2607

MILTON SONNEBERG,

Appellant

v.

UNITED STATES OF AMERICA

On appeal from the United States District Court
for the District of New Jersey

District Court Judge: The Honorable Nicholas H Politan
(D.C. Civil No. 00-cv-1000)

Submitted Under Third Circuit L.A.R. 34.1(a)
January 14, 3003

Before: ROTH, FUENTES, Circuit Judges,
and ALDISERT, Senior Circuit Judge

(Opinion Filed: April 4, 2003)

OPINION OF THE COURT: FUENTES, Circuit Judge

*Appendix A*

Milton Sonneberg appeals the District Court's denial of his petition for collateral relief pursuant to 28 U.S.C. § 2255. Sonneberg was convicted of conspiracy to commit wire fraud and mail fraud, wire fraud and multiple counts of each of mail fraud and interstate transportation of money obtained through fraud. Sonneberg contends in his Section 2255 petition that the Supreme Court's decision in **Neder v. United States**, 527 U.S. 1 (1999), is an "intervening change in the law" that establishes that he has been convicted for offense conduct that is not a crime. We disagree. For the reasons that follow, we will affirm the District Court's denial of Sonneberg's Section 2255 petition.

## I. BACKGROUND

Sonneberg was indicted by a federal grand jury on April 23, 1995, along with Irwin H. Block (sic) (a/k/a "Sonny Bloch"), James Barschow , Joseph Glenski, and Bruce Schroeder. Sonny Bloch pleaded guilty to eight of the thirty-five counts in the indictment on September 18, 1996. A federal grand jury returned a thirty-count superceding indictment against the remaining four defendants on December 18, 1996. Barschow, Glenski and Schroeder pleaded guilty to nine counts on April 9, 1997. Another thirty-count superceding indictment was filed against Sonneberg on April 23, 1997. In that indictment, Sonneberg was charged with the following offenses: (1) conspiracy to commit wire fraud and interstate transportation of money obtained through fraud in violation of 18 U.S.C. § 371; (2) conspiracy to commit mail fraud and interstate transportation of money obtained through fraud in violation

of 18 U.S.C. § 371; (3) wire fraud in violation of 18 U.S.C. § 1343; (4) four counts of mail fraud in violation of 18 U.S.C. § 1341.

A trial commenced on May 1, 1997. In brief, the facts established at trial show that Sonneberg, Bloch, Barschow, Glenski and Schroeder conspired to market limited liability company ("LLC") interests in a series of wireless cable television ventures and in a proposed radio-station network. The conspirators' sales pitches promised potential investors unparalleled opportunities in the cutting-edge technology of wireless cable television systems and a network of independent broadcasters owned by "Bloch Broadcasting." The problem with the sales pitches was there were no viable business ventures behind them. In fact, the wireless cable systems being promoted did not have any of the resources, such as profitable channels, sites and FCC licenses , necessary to make them operable, much less profitable. And "Bloch Broadcasting" was a shell company with no assets. Nonetheless, the promoters raised millions of dollars from investors. Approximately forty percent of the investor money was paid to the conspirator-promoters in the form of sales commissions.

Sonny Bloch touted the sale of the LLCs on his nationally-syndicated radio program, "The Sonny Bloch Radio Show." Bloch had 1.5 million listeners and a good reputation as a consumer advocate. He agreed to endorse the sale of the LLCs and to vouch for the character of the promoters and the financial soundness of the ventures on his radio program. Despite the fact that Bloch was paid $2000

per week for these endorsements, he made them sound personal rather than commercial. The conspirators used Bloch's radio program to develop leads to market the LLCs.

The conspirators also developed sales brochures for each of the LLCs they were promoting. The brochures included inflated financial projections and promised unrealistically high returns. The brochures misrepresented the true identity of the principals in the ventures, how the investment money would be allocated, the claims regarding the subscribership base for the ventures, and the ability of investors to participate in management decisions. The brochures also failed to disclose the prior criminal convictions and civil fraud injunctions against certain of the conspirators, including Sonneberg.

On May 29, 1997, Sonneberg was convicted of all thirty counts alleged in the indictment. The District Court sentenced him to a 76 month prison term and ordered him to pay $5.2 million in restitution. Sonneberg appealed his conviction and sentence. On August 12, 1998, this court affirmed his conviction and sentence by judgment order. **United States v. Sonneberg**, 164 F.3d 621 (3d Cir. 1998) (unpublished, non-precedential opinion). The Supreme Court denied his petition for certiorari on March 5, 1999.

On March 1, 2000, Sonneberg filed a petition for collateral relief pursuant to 28 U.S.C. § 2255. While that petition was pending in the District Court, Sonneberg filed a petition for a writ of mandamus, which this Court denied on March 20, 2001. On April 6, 2001, the District Court denied his Section 2255 petition and denied him a certificate of

appealability. The District Court denied Sonneberg's motion to reconsider.

On May 2, 2001, Sonneberg filed a timely notice of appeal and a request for a certificate of appealability from this Court. By order dated June 18, 2002, this Court granted Sonneberg a certificate of appealability limited to two of his claims: (1) that the District Court failed to instruct the jury on an element of the offense; and (2) that the government used an untenable theory of materiality, resulting in a conviction for offense conduct that is not a crime.

## II. ANALYSIS

The District Court had jurisdiction over Sonneberg's petition for collateral relief pursuant to 28 U.S.C. § 2255. We have jurisdiction over his appeal pursuant to 28 U.S.C. § 2255, 1291. We have plenary review over the District Court's denial of Sonneberg's Section 2255 petition. **United States v. Lloyd**, 188 F.3d 184, 186 (3d Cir. 1999).

28 U.S.C. § 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to

> collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

It is well settled that a petitioner generally may not relitigate issues that were decided adversely to him on direct appeal by means of a Section 2255 petition. **See United States v. DeRewal**, 10 F.3d 100, 105 n.4 (3d Cir. 1994). An exception exists, however, when there has been an "intervening change in the law" affecting the claim previously decided adversely to the petitioner. **See Davis v. United States**, 417 U.S. 333 (1974).

The certificate of appealability sets forth two claims: (1) that the District Court failed to instruct the jury on an element of the offense; and (2) that the government used an untenable theory of materiality, resulting in a conviction for offense conduct that is not a crime. As Sonneberg's brief makes clear, these two claims collapse into one argument that, prior to finding liability for mail and wire fraud on the basis of a material non-disclosure, a jury must first find that the defendant was under a duty to disclose, and that, in this case, the District Court erred in failing to instruct the jury on this element of the offense.

This claim was previously litigated on direct appeal. The first issue raised in Sonneberg's opening brief on direct appeal is "The Jury Was Improperly Permitted to Convict on the Basis of Nondisclosures." (Supp. App. at p. 9) The arguments he made in support of the asserted error were as follows: (1) the mail and wire fraud statutes require a duty to disclose before imposing liability for a material omission;

(2) because he had no duty to disclose his prior guilty plea and civil injunction, he was convicted on a legally insufficient theory; (3) the jury was never instructed that it had to find that he had a legal duty to disclose; and (4) reversal is required because the jury was permitted to find guilt on legally impermissible and unconstitutional theory. **Id.** at 9-10. After considering Sonneberg's arguments, this Court affirmed his conviction and sentence. **United States v. Sonneberg**, 164 F.3d 621 (3d Cir. 1998) (unpublished, non-precedential opinion). Thus, this Court has already considered the central argument raised by Sonneberg in his Section 2255 petition namely, that the duty to disclose is a required element of the offenses of mail and wire fraud.

Despite the fact that we have already decided this issue adversely to Sonneberg, he urges us to reconsider it in light of **Neder v. United States**, 527 U.S. 1 (1999), which he asserts is an "intervening change in law." We do not agree that Neder is an intervening change in the law warranting relitigation of the issue already decided on direct appeal. First, **Neder** is not a "change in law" because the two holdings of Neder do not pertain to the issue raised by Sonneberg. In fact, **Neder** did not change the state of the law pertaining to whether a duty to disclose is an element of the offenses of mail and wire fraud. And second, **Neder** is not an intervening decision.

In Neder, the defendant had been "tried on charges of violating a number of federal criminal statutes penalizing fraud." 527 U.S. at 4. The government conceded that the district court erred in refusing to submit the issue of materiality to the jury with respect to the tax fraud charges.

**Id.** The Supreme Court held that an instruction that omits an element of the offense, such as the instruction on tax fraud, does not necessarily render a criminal trial unfair, and is thus subject to harmless error analysis. **Id**. at 4, 9. The Court also held that "*materiality is an element of the federal mail, wire and bank fraud statutes*." **Id**. at 4 (emphasis added).

In this case, the District Court properly instructed the jury that materiality is an element of the offenses of wire and mail fraud. (App at pp. 40-471). Sonneberg does not contest the District Court's materiality instruction. Instead, Sonneberg argues that the District Court failed to instruct the jury that duty to disclose is an element of the offenses in mail and wire fraud when there is an allegation of a material non-disclosure. Neither holding of **Neder** bears on that argument.

Sonneberg argues, however, that certain language in Neder supports his argument that the duty to disclose is an element of mail and wire fraud. Specifically, he points to the Court's rejection of the government's argument that Congress "chose to unmoor the federal mail fraud statute from its common-law analogs . . ." **Neder**, 527 U.S. at 24. Based on this statement, Sonneberg contends that, because duty to disclose was an element of common-law fraud, it must remain an element of the federal mail and wire fraud statutes. Sonneberg overlooks the fact that in determining that the common-law element of materiality remains an element of federal mail and wire fraud, the Court observed that "*the fraud statutes did not incorporate all the elements of common-law fraud.*," including the elements of reliance and damage. **Id**. at 24-25 (emphasis in original). Sonneberg also

disregards the fact that the Court was only considering the element of materiality in the **Neder** decision. Thus, the language cited by Sonneberg is not sufficiently precise to be an "intervening change in law" warranting relitigation of an issue previously decided on direct appeal.

Sonneberg also overlooks the substantial precedent establishing that duty to disclose is not always an element of common-law fraud when there has been a material non-disclosure. In a decision post-dating Neder, the Fourth Circuit recognized that "[t]he Supreme Court has recently articulated an outer boundary for the interpretation of the federal fraud statutes," but nonetheless found that "at common law, no fiduciary relationship, no statute, no other independent legal duty to disclose is necessary to make active concealment actionable fraud - simple 'good faith' imposes an obligation not to purposefully conceal material facts with intent to deceive." **United States v. Colton**, 231 F.3d 890, 899-900 (4th Cir. 2000) (citing **Neder**, 527, at 1; **Strong v. Repide**, 213 U.S. 419, 430 (1909); **Tyler v. Savage,** 143, U.S. 79, 98 (1892); **Stewart v. Wyoming Cattle Ranch Co.**, 128 U.S. 383, 388 (1888)); **United States v. Keplinger**, 776 F.2d 678, 697-98 (7th Cir. 1985); **United States v. Townley**, 665 F.2d 579, 585 (5th Cir. 1982); **United States v. Allen**, 554 F.2d 398, 410 (10th Cir. 1977). ***Thus it is clear that both before and after the Neder decision, duty to disclose is not a required element of the common-law offenses when there have been material non-disclosures.***

Not only is Neder not an (sic) "change in law" with respect to Sonneberg's claim, it is also not "intervening." Sonneberg's conviction and sentence were affirmed by this

Court on August 12, 1998. He petitioned to the Supreme Court for certiorari, and raised the issue of whether "a defendant may be convicted under the federal mail and wire fraud statutes for failing to disclose certain information despite having no duty to disclose that information." (Supp. App. At p. 232). Sonneberg's petition for certiorari was pending when the Court decided **Neder**. ***In fact, Neder was decided on February 23, 1999, and the Court denied Sonneberg's petition on March 5, 1999.*** Because Sonneberg's petition was not final until his petition for certiorari was denied, see **Kapral v. United States**, 166 F.3d 565, 570 (3d Cir. 1999), the **Neder** decision was not "intervening." Moreover, because Sonneberg's petition was still pending when **Neder** was decided, if the Court thought that **Neder** was relevant to Sonneberg's claims, the Court could have remanded his case for further proceedings. Instead the Court simply denied Sonneberg's petition.

In sum, because Sonneberg has not established an "intervening change in law" he is not entitled to relitigate the claim decided adversely to him on direct appeal. Accordingly, we will affirm the District Court's denial of Sonneberg's Section 2255 petition.

TO THE CLERK OF THE COURT

Kindly file the foregoing Opinion

/s/
Julio M. Fuentes
Circuit Judge

## APPENDIX B — LETTER OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED APRIL 6, 2001

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

CHAMBERS OF
NICHOLAS H. POLITAN
JUDGE

April 6, 2001

**LETTER OPINION**
**ORIGINAL ON FILE WITH**
**CLERK OF THE COURT**

Mr. Milton Sonneberg
Reg. No. 20869-050
P.O. Box 1000
Fort Dix, NJ 08640
Petitioner *Pro Se*

Alain Leibman, Assistant
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ROBERT J. CLEARY, UNITED STATES ATTORNEY
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Attorney for Respondent

Re: Milton Sonneberg v. United States
Civil Action No. 00-1000 (NHP)

*Appendix B*

Dear Litigants:

This matter comes before the Court on the petition of Milton Sonneberg to vacate, set aside or correct a sentence pursuant to 28 U.S.C. 2255. This matter was resolved without oral argument pursuant to Fed.R.Civ.P. 78. The Court has reviewed the written submissions of the parties and, for the reasons explained herein, the petition of Milton Sonneberg to vacate, set aside, or correct the sentence is **DENIED** and **DISMISSED**. No certificate of appealability shall issue. This case is now **CLOSED**.

**BACKGROUND**

Petitioner, Milton Sonneberg ("petitioner"), acting *pro se*, brings this civil action pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct the sentence, or in the alternative, to remand for an evidentiary hearing.

The facts of this case are fairly straightforward. Petitioner was indicted by a federal grand jury on April 23, 1995, along with four other individuals: Irwin H. Block (sic), a/k/a "Sonny Block," James Barschow, Joseph Glenski, and Bruce Schroeder. Sonny Bloch pled guilty to eight counts in the thirty-five count indictment on September 18, 1996.

A federal grand jury returned a thirty-count superseding indictment against the remaining defendants on December 18, 1996. A trial was scheduled to begin on April 7, 1997. On April 9, 1997 Glenski, Schroeder, and Barschow pled guilty to nine counts in the superseding indictment.

*Appendix B*

A thirty-count second superseding indictment was filed against petitioner on April 23, 1997. This indictment charged petitioner with the following offenses: conspiracy to commit wire fraud and interstate transportation of money obtained through fraud in violation of 18 U.S.C. § 371; conspiracy to commit mail fraud and interstate transportation of money through fraud in violation of 18 U.S.C. § 371; wire fraud in violation of 18 U.S.C. § 1343; twenty-three counts of interstate transportation of money obtained through fraud in violation of 18 U.S.C. § 2314; and four counts of mail fraud in violation of 18 U.S.C. § 1341.

A trial commenced on May 1, 1997, and petitioner was convicted of all thirty counts on May 29, 1997. This Court sentenced petitioner on December 16, 1997, to a seventy-six month term of imprisonment, followed by five years of supervised release. Petitioner was also ordered to pay %5.2 million in restitution. Final judgment was entered on January 9, 1998.

Petitioner filed a notice of appeal from his conviction. On August 12, 1998, the Court of Appeals for the Third Circuit affirmed petitioner's conviction. The United States Supreme Court denied his petition for *certiorari* on March 5, 1998.

Petitioner filed the instant petition on March 1, 2000. He filed a writ of mandamus with the Court of Appeals for the Third Circuit on August 13, 2000. That court denied petitioner's writ of mandamus on March 20, 2001. In his petition, petitioner claims several errors occurred at trial, including the following: (1) the district court failed to instruct

the jury on an element of the offense; (2) the government used an untenable theory of materiality; (3) ineffective assistance of counsel based on counsel's (a) permitting the presentation of false testimony by government; (b) permitting of inadmissible evidence; c) conflict of interest; and (d) failure to recognize and defend against the aforementioned alleged errors.

***Discussion***

**I.** ***Standard of Review***

Section 2255 of Title 28 of the United States Code provides a means of collaterally attacking a sentence imposed after a conviction. Section 2255 provides, in pertinent part:

> A petitioner in custody under the sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . .

The grounds for collateral attack of a sentence pursuant to Section 2255 are narrowly limited. *See United States v. Biberfeld*, 957 F.2d 98, 102 (3d Cir. 1992). The Third Circuit has recognized that "not all non-constitutional errors in

criminal proceedings enable a prisoner to bring an action under [Section] 2255 for relief." *Diggs v. United States*, 740 F.2d 239, 242 (3d Cir. 1984); *accord United States v. Vancol*, 778 F.Supp. 219, 22 (D.Del. 1991), *aff'd*, 970 F.2d 901 (3d Cir. 1992).

A motion under Section 2255 will be granted "only if the sentence results in 'a fundamental defect which inherently results in a complete miscarriage of justice' or 'omission inconsistent with rudimentary demands of fair procedure.'" *United States v. Cannistraro*, 734. F.Supp. 1110, 1119 (D.N.J. 1990) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)); *see also United States v. DeLuca*, 889 F.2d 503, 506, 93d. Cir. 19898), *cert. denied*, 496 U.S. 939 (1990); *Vancol*, 778 F.Supp. at 222-23. Similarly, errors of fact will not provide a basis for relief unless "the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *United States v. Addonizio*, 442 U.S. 178, 185-86 (1979) (quoting *United States v. Mayer*, 235 U.S. 55, 69 (1914)).

A petitioner's failure to raise a particular error either at trial or on direct appeal generally precludes the assertion of that error for the first time in a collateral attack under Section 2255. *See United States v. Essig*, 10 F.3d 968, 979 (3d Cir. 1993); *United States v. DeRewal*, 10 F.3d 100, 105 n.4 (3d Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994); *United States v. Oser*, 864 F.2d 1056, 1061 (3d Cir. 1988). Where a Section 2255 motion rests on issues not raised at trial or on direct appeal, the petitioner bears the burden of demonstrating both "cause" to excuse the procedural default and that "actual prejudice" will result from the errors at issue. *See United*

*States v. Frady*, 456 U.S. 152, 167, *reh'g denied*, 456 U.S. 1001 (1982); *Essig*, 10 F.3d at 979; *DeRewal*, 10 F.3d at 105 n.4; *Biberfeld*, 957 F.2d at 104. "[T]he existence of cause for procedural default must ordinarily turn on whether some objective factor external to the defense impeded counsel's effort to comply with the . . . procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also Essig*, 10 F.3d at 979.

**II. *Duty to Disclose***

*Petitioner claims he was improperly convicted of mail and wire fraud based upon his failure to disclose to investors his prior criminal conviction and civil fraud injunction. He argues that his conviction cannot stand because the law imposed upon him no duty to disclose such information. Petitioner's premise is flawed.* ***As respondent correctly points out, the mail and wire fraud statutes are not limited to matters which would be punishable as common law fraud. See Durland v. United States, 161 U.S. 306, 313-14 (1896)***; *United States v. Moore*, 37 F.3d 169, 172-73 (5th Cir 1994); *United States v. Stewart*, 872 F.2d 957, 960; *United States v. Bishop*, 825 F.2d 1278, 1280 (8th Cir. 1987). "[O]missions or concealment of material information can constitute fraud . . . cognizable under the mail fraud statute, without proof of a duty to disclose the information pursuant to a specific statute or regulation." *United States v. Keplinger*, 776 F.2d 678, 697 (7th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986). ***Thus, petitioner was not entitled to a duty to disclose instruction because it is not an essential element of the offense of mail or wire fraud.*** *See United States v. Maxey*, 898 F.2d 148 (4th Cir. 1990). Indeed, as the Fifth Circuit has

indicated, petitioner's contention that he had no duty under the law to disclose his criminal conviction is therefore "irrelevant" to the question before this Court.[1] *See Moore*, 37 F.3d at 172. Also, the Third Circuit rejected this same argument in affirming petitioner's conviction upon direct review.

In addition, petitioner's reliance on *Chiarella v. United States*, 445 U.S. 222 (1980) is misplaced. *Chiarella* involved a defendant's conviction under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and SEC Rule 10b-5; not mail and wire fraud as is the case here. *Chiarella* simply is not applicable to this case. As petitioner has not established a fundamental defect which would inherently result in a complete miscarriage of justice, his claim on this basis is denied.

## III. *Improper Jury Charge*

Petitioner next contends that the Court improperly charged the jury regarding the concept of materiality. This argument is likewise without merit. This Court at trial

1. The Court notes that the indictment charged not only charged petitioner with failure to disclose his previous criminal conviction and civil fraud injunction, but also charged petitioner with affirmative misrepresentations, false and misleading statements and material omissions of fact made with regard to such as the true identity of the principals involved in the investment schemes, the uses of the proceeds, the profits to be made, and the ability of investors to participate in management decisions. Thus, the jury was not invited to convict petitioner on the basis of omissions alone; it is quite possible the jury convicted petitioner on the basis of affirmative misrepresentation and concealment as well.

defined materiality in the following manner: "[a] material fact is a fact that would have a natural tendency to influence or be capable of influencing a person making a decision about a particular matter of transaction." This language is virtually identical to the language consistently used by the Supreme Court in defining "materiality." In *United States v. Wells*, 519 U.S. 482 (1997), the Supreme Court defined materiality as "hav[ing] a natural tendency to influence or [being] capable of influencing the decision of the decisionmaking body to which it was addressed." *See also Kungys v. United States*, 485 U.S. 759, 770 (1988). The Third Circuit has expressed a similar definition of materiality. *See In re David Louis Cohn*, 54 F.3d 1108, 1114 (3d Cir. 1995); *United States v. Greber*, 760 F.2d 68, 73 (3d Cir. 1985). The Third Circuit also rejected this claim upon petitioner's direct appeal.

In addition, the court instructed the jury that the charged schemes included both false statements about the details of the venture, such as the use to be made of the investors' money , and the failure to disclose material facts about the investment and petitioner and others involved in the ventures. Moreover, the Court also instructed the jury that while it was not required to find that every charged component of the scheme was proved, it did have to find that "the scheme, substantially as charged, was set up." As a result, petitioner's reliance on *Yates v. United States*, 354 U.S. 298 (1957) is mistaken, since *Yates* requires reversal only when the jury's verdict may have rested on a legally invalid ground and "it is impossible to tell which ground the jury selected." 354 U.S. 298, 312.

Here, it is not impossible to discern which ground the jury selected. It is entirely possible that the jury's verdict meant it found that the scheme was set up "substantially as charged." It is unlikely the verdict would have been different if the single charge of concealment of petitioner's criminal conviction and civil injunction had not been included in the indictment. Even assuming *arguendo* that the Court improperly instructed the jury, any error was harmless. *See Neder v. United States*, 527 U.S. 1, 6-8 (1999) ("[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutiona[l] errors that may have occurred are subject to harmless-error analysis.") (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)). Moreover, at trial the government presented substantial and overwhelming evidence that petitioner had participated in a scheme to defraud by failing to disclose to the investors that he had been convicted of conspiracy to commit securities fraud and permanently enjoined from selling securities. The government also advance significant evidence of petitioner's fraudulent intent and active participation in the conspiracy. Accordingly, petitioner's claims on this basis must be denied.

**IV. *Perjury***

Petitioner also alleges several witnesses and co-conspirators presented perjured testimony at trial and that the prosecution know of the perjury but still presented the witnesses in any event. These instances of perjury, it is argued, rose to the level of constitutional violation. Yet, petitioner proffers on bald, conclusory and self-serving allegations of perjury. No factual evidence of perjury

committed by any witness, co-conspirator or co-defendant is offered by petitioner. Petitioner's claims based on perjury must accordingly be denied.

## V. *Ineffective Assistance of Counsel*

Petitioner next argues that his trial counsel was ineffective because he failed to object to the admissibility of audio tapes presented by a witness named Lionel Benedict. Petitioner contends that the government and defense counsel knew the tapes were inadmissible. His only objection to the tapes is that they were incomplete. Petitioner asserts that his trial counsel was "too inept and intimidated" to properly advocate his position. Furthermore, petitioner alleges that this admission was a violation of Federal Rule of Evidence 107.

In order to prevail on his claim of ineffective assistance of counsel, petitioner must satisfy a two-prong test. First petitioner must prove that counsel's performance was so grossly deficient as to deny the petitioner his Sixth Amendment right.

*See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to prove a deficient performance, petitioner must show that counsel's representation fell below " an objective standard of reasonableness." *See* id. at 688. In demonstrating such deficient performance, the petitioner must show that, in effect, counsel's errors were so serious that "counsel was not functioning" as an advocate. *See id.* at 687. A court "must indulge a strong presumption that counsel's conduct falls within range of reasonable professional assistance . . ." *Id.* at 691.

Second, to prove ineffective assistance of counsel must show that he was prejudiced as a result of the deficient performance of his attorney. *See id.* at 687. To show such prejudice, petitioner must prove that the errors of the attorney were "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The petitioner must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Petitioner's ineffective assistance of counsel claim is without merit. Petitioner offers only vague and self-serving allegations that his counsel, Mr. Moskowitz, failed to notify the Court of false testimony[2] and failed to object to the admissions of the Lionel Benedict audio tapes. Petitioner has offered no evidence substantiating these allegations.

To the contrary, the record demonstrates that Mr. Moskowitz provided a solid and spirited defense on petitioner's behalf, and in no way fell below a standard of reasonableness. Mr. Moskowitz did indeed challenge the authenticity of the Lionel Benedict tapes. Moreover, through vigorous cross-examination, Mr. Moskowitz obtained concessions from several witnesses that they lied on prior occasions and made statements that were inconsistent with their testimony at trial. Assessing Mr. Moskowitz's overall performance during the trial, this Court cannot say that his representation fell below an objective standard of reasonableness. Indeed, even assuming *arguendo*

2. Since no evidence of perjury has been offered, any ineffective assistance of counsel claim based upon Mr. Moskowitz's alleged failure to address perjurious testimony is meritless.

Mr. Moskowitz's performance was deficient, petitioner suffered no prejudice since it is unlikely the result would have been different in light of the overwhelming evidence offered against him. Accordingly, petitioner's ineffective assistance of counsel claim is denied.

Petitioner also asserts a claim of ineffective assistance of counsel based upon a conflict of interest. It is alleged that Petitioner's second defense counsel, Gail Nichols, Esq. ("Nichols"), resigned as defense counsel after serving for more than a year in that capacity. Petitioner argues that Nichols suffered from an actual conflict of interest because she resigned to become chief of the criminal division of the same United States Attorney's Office which prosecuted petitioner.

Where an ineffective assistance of counsel claim is based upon the existence of a conflict of interest arising from counsel's multiple representation, the petitioner "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). The mere possibility of a conflict of interest is not sufficient to collaterally attack a conviction. *See id.* Furthermore, once an actual conflict of interest is found the petitioner need not prove prejudice. *See id.* At 349-50. The Supreme Court has not expanded the standard set forth in *Cuyler* beyond cases involving multiple representation.

Petitioner's conflict of interest claim is likewise without merit. First, ineffective assistance of counsel based on a conflict of interest typically involves multiple representation,

where a lawyer defends two or more clients or represents or previously represents a testifying witness. A conflict of interest may also arise where an attorney was involved in the alleged criminal activity. This case, however, does not involve multiple representation. Rather, it deals with Nichols joining the United States Attorney's Officer (sic). Other than self-serving conclusions, petitioner fails to establish an actual conflict of interest on Nichols' part. Indeed, there is not even an existence of a "possibility" of a conflict of interest, which in any event would not suffice to collaterally attack a conviction.[3] Petitioner offers only speculation and his own suspicion of a conflict of interest. He has not explained what Nichols did, or failed to do, as a result of the purported conflict which may have affected the outcome of the trial. This is not sufficient to grant petitioner's request for relief. As a result, petitioner's claim of conflict of interest must be denied.[4]

Lastly, petitioner in his amended petition alleges government misconduct contributed to his convictions (sic). He presents not a shred of evidence of government misconduct. Nor has petitioner shown he was deprived of a

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3. Nichols' representation of petitioner ended before the criminal trial commenced.

4. To the extent that, as respondent suggests, petitioner's claim of conflict of interest is actually a general ineffective assistance of counsel claim because petitioner alleges Nichols' attention to his case diminished at some point, this claim is also denied. There is no evidence that Nichols' performance fell below an objective standard of reasonableness and no evidence that petitioner suffered prejudice as a result of any alleged deficiency in Nichols' representation.

fair trial in any way. This Court previously found no government conduct (sic) occurred at trial. The Third Circuit similarly rejected petitioner's claim on this basis upon direct review.

Because petitioner's claims are wholly without merit, no evidentiary hearing is warranted and the petition is denied and dismissed.

## CONCLUSION

For the aforementioned reasons, the petitioner Milton Sonneberg's petition to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255 is **DENIED** and **DISMISSED.** Accordingly, this case is now **CLOSED**.

A certificate of appealability shall not issue since the petitioner has not made a substantial showing of the denial of a constitutional right.

An appropriate Final Order accompanies this Letter Opinion.

*/S/ Nicholas H. Politan*
**NICHOLAS H. POLITAN**
**U.S.D.J**

**APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JULY 14, 2003**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.01-2067

MILTON SONNEBERG,

Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court
for the District of New Jersey

District Court Judge: The Honorable Nicholas H. Politan
(D. C. Civil No. 00-cv-01000)

**SUR PETITION FOR REHEARING EN BANC**

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO FUENTES, SMITH, *Circuit Judges*, and ALDISERT[1]

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges

1. Judge Aldisert is limited to panel rehearing only.

who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT

/s/
United States Circuit Judge

DATED: JUL 14 2003